for negligence. *Chysky* v. *Drake Brothers Co. Inc.* (App. Div. 1st Dept. 1920) 182 N. Y. Supp. 459.

Generally, in a sale by the manufacturer, the law implies a warranty against latent defects arising out of the process of manufacture. *Kellogg Bridge Co.* v. *Hamilton* (1884) 110 U. S. 108, 3 Sup. Ct. 537; *Hoe* v. *Sanborn* (1860) 21 N. Y. 552; *Sinclair* v. *Hathaway* (1885) 57 Mich. 60, 23 N. W. 459. But unlike covenants running with the land, warranties do not run with personalty. *Offutt* v. *Twyman* (1839) 39 Ky. 43; see *Nelson* v. *Armour Packing Co.* (1905) 76 Ark. 352, 90 S. W. 288; *Bordwell* v. *Collie* (1871) 45 N. Y. 494. A contrary conclusion has been reached on the ground that the law implied a warranty directly to the consumer and not to the middleman. *Dothan Chero-Cola Bottling Co.* v. *Weeks* (Ala. 1918) 80 So. 734. That such a contention has some basis in reason is clear, since the sale to a retailer by the manufacturer of perishable food for human consumption has as its ultimate object a sale to the consumer. The middleman is the result of the growth and complexity of our industrial system and, in this instance particularly, a mere instrumentality for bringing the manufacturer and consumer together. But the doctrine of "no contract, no warranty", is too firmly established to be altered except by statute. However, a manufacturer may be liable for *negligence,* irrespective of contract; (1916) 16 Columbia Law Rev. 428; (1905) 5 *ibid.* 67; *Parks* v. *The C. C. Yost Pie Co.* (1914) 93 Kan. 334, 144 Pac. 202; *Catani* v. *Swift & Co.* (1915) 251 Pa. 52, 95 Atl. 931; *contra, Salmon* v. *Libby, McNiel & Libby* (1904) 114 Ill. App. 258, and the tendency is to raise the standard of care required of him. (1916) 16 Columbia Law Rev. 428; see *Parks* v. *The C. C. Yost Pie Co., supra.* But in the instant case, no negligence on the defendant's part was alleged or proved. Although the instant case cannot, therefore, be supported according to settled doctrine on either of the two grounds advanced by the court, the conclusion imposing practically an absolute liability upon a manufacturer of food for human consumption may be desirable for the protection of the public.

BOOK REVIEWS

Railroad Valuation by the Interstate Commerce Commission. By Homer B. Vanderblue. Cambridge: Harvard University Press. 1920. pp. 119.

This is a reprint of two articles in the Quarterly Journal of Economics. It supplements the author's previous "Railroad Valuation" (Boston and New York: Houghton Mifflin Co. 1917. pp. xiii, 222.) by examining critically the valuation work of the Interstate Commerce Commission under the Valuation Section (19*a*) of the Interstate Commerce Act of 1913, the text of which is printed as an appendix. The commission is required by this Act to report and to set down separately "the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation" of "each piece of property owned or used by said common carrier for its purposes as a common carrier"; also "the original cost of all lands, rights of way, and terminals", and "the present value of the same". At the time of publication, the commission had made formal findings of the separate "basic facts"

in regard to a number of railroads, but had not taken what it called "the one step of deducing from the facts stated the sum to be found". The author points out the absurdity of the idea, inherent in the Act itself as well as in the commission's language, that anything *can* be deduced from such totally different facts. As well might one attempt to "deduce" something at "one step" from a "consideration" of the figures showing a man's weight, his age, the number of books he has read and his annual income. Yet the earnings which our railroads may obtain from their customers are to depend on the results of the scholastic exercises of a body of men who take seriously such a metaphysical inquiry! The notion is doubtless a relic of the old fallacy of trying to base earnings on the condemnation value, which is itself the result of earnings. Whether fallacious or not, however, is irrelevant, according to the arguments of some of the railroad attorneys cited, who urge without shame the condemnation analogy on the ground that judicial authority sanctifies bad logic. To those who feel thus the author's exposure of the fallacy will make no difference. To others it should be conclusive.

The book deals not only with the "final valuation", but it also follows the reasoning of the commission and of the attorneys into the details of their search for the "basic facts". As in the author's previous book (which is incorporated into this one by reference), the detail is at times wearisome; but the task is worth while as showing beyond shadow of doubt the unreality and the practical irrelevance of the search for reproduction cost, whether new or depreciated. The reviewer believes that the most consistent interpretation of the Supreme Court's decisions requires a return on the exchange value of the "physical property", and that this is equivalent to the cost of replacing it with an equally efficient substitute, unless the value as an earning concern is less. If the court should sanction this interpretation explicitly, instead of leaving it to somewhat uncertain inference, then searches for this unreal replacement cost will have to be made. The fact will remain, however, that the rule is a wholly unnecessary deduction from the Fourteenth Amendment, and a ridiculous economic policy. The purchaser of stock makes no distinction between the "physical" and the "intangible" elements of value. He suffers as much for each dollar's worth of "intangible" value destroyed as for a dollar's worth of "physical" value. If we are going to permit destruction of part of his value, we might draw the line where it will serve some purpose to draw it. To safeguard a value equal to the amount of capital that has to be attracted will serve the purpose of attracting that amount of capital, though it may work hardship to the "innocent investor". To safeguard a value equal to the amount of capital that *would* have to be attracted were the road to be built to-day instead of when it was in fact built, does not protect the innocent investor, any more than does the other practice; and it fails to serve the purpose which the other practice does serve. The labor, ingenuity and expense of ascertaining the reproduction cost, in other words, are a net waste, the result of the Supreme Court's ambiguous metaphysics, following *Smyth* v. *Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, modified 171 U. S. 361, 18 Sup. Ct. 888.

The author would evidently prefer to base the returns on the original unimpaired investment. This means, as nearly as I can judge from both his books, the amount which each piece of the existing property cost the company when bought, whether or not it was paid for out of earnings, minus accrued depreciation. It includes nothing by way

of an addition of deficits. The accrued depreciation is "the amount of the original investment in capital goods used up in furnishing current services" (page 124 of the earlier book). But "investment is made in terms of dollars, and can only be measured in terms of dollars". Yet it is not value. That, as the author makes clear, would lead to the familiar vicious circle. If "investment" is measured in dollars, and is not existing exchange value, what else can it be but an historical fact—the fact of what the plant *did* cost? How, then, can this historical fact be "used up"? As long as any part remains in existence, the original cost of that part is an unchanging fact. The reviewer is quite unable to see how it can be "used up"—any more than one's "weight at birth" can increase or diminish. In the author's deduction of depreciation, as well as in his refusal to discriminate between property bought from earnings and from new capital, to add deficits and to deduct surpluses, he appears to ignore the requitement theory. On that theory, everything reasonably spent for the service must be requited—if commercially possible—current expenses from current earnings, capital expenses either from past earnings in excess of current expenses, or else from future earnings in excess of current expenses. The requitement from future earnings may take the form either of a "fair return" on the cost year by year, or of a fair return plus a part of the principal some years followed by a fair return on the balance of the principal thereafter, or of a fair return minus a deficit in some years followed by a fair return on the principal plus the deficits, thereafter. A failure to earn a fair return any year is a failure to be requited. On the requitement theory, the failure must be offset subsequently. The receipt of earnings in excess of a fair return is more than a requitement, unless the excess be deducted from the rate base thereafter, or unless it has been reinvested in the plant. If reinvested, however, it should be remembered that that much of the property has been acquired by expenditures for which the company has been requited in advance. On this principle, there will be no penalization, such as the author fears, of the companies which have foregone dividends to add to their plant. If they have foregone even a "fair return", the deficit will be added to their rate base for future requitement. If they have invested only surpluses above a fair return, they will be spared the diminution of rate base which their less thrifty brethren will suffer.

One argument against adding deficits is unworthy of the author—namely, the supposed absurdity of saying "the more unsuccessful a project has been, . . . the greater is its 'value' as a going concern". (Original book, pages 173-174.) As the author so well maintains elsewhere, we are dealing with cost, not value. Of more weight is the contention that the policy of adding deficits will make a protracted deficit a substantial goal for efficient management. This would be true if the task of correcting dishonest extravagance in this regard is as hopeless as the author thinks, and if, moreover, the deficit can be incurred in a manner which will somehow benefit the stockholders in their capacity as outsiders. Without this last possibility, the prospect of earning a return on the deficits *if business conditions permit* would not be a sufficient inducement for the sure loss of the earlier returns.

This requitement theory, as the author points out, makes one less risk for the company. In other words, the investment would be less speculative and could be called forth by a lower rate of return. On the other hand, it eliminates a possible source of speculative gain to the company, and thus perhaps makes a higher rate of return than

otherwise necessary. This elimination of speculative possibilities both ways may not be desirable for all kinds of investments. It would seem at first sight, however, to accord with the elimination of "unearned increment" from the rate base. Some part of the "unearned increment", it should be noted, he eliminates from the nominal rate base only, and not from the pockets of the owners. This result he accomplishes by allowing a rate of return higher than what is now needed to attract capital—on the theory that a higher rate may have been required in the early and more uncertain stages (pages 199-200 of the earlier book). That theory he stretches to justify a return from which will emerge whatever differential happens to exist in one road by reason of its possession of a location superior to that of its rival. He seems inclined to justify this differential because it is not due to excessive rates, since the two roads must obviously charge the same rates. It might be eliminated by taxation, but with no more justification than similar increments on private lands (page 205, original book). This is not the same thing, however, as saying that the rate of return resulting in the differential was the rate on original cost needed at the start. (See pages 202-205 of original book, quoted on pages 86-97 of the new one.)

Robert L. Hale

A NEW PRINCIPLE OF INTERNATIONAL LAW. By A. M. M. MONTJIN. The Hague: BELINFANTE BROS., LTD. 1919. pp. 56.

This monograph was prepared and apparently put to press a month before the signing of the Armistice in November, 1918. The end of the conflict not being then visible, the author recommended to the belligerents the adoption of "science" as the basis of an early and durable peace. By this he meant science applied in conformity with the principles of "anthropo-geography". Ascribing international conflicts chiefly to the pressure of population in particular countries, he proposes to establish, as a new principle of international law, the "equality of density of population"; which is to be brought about by the periodical revision of national frontiers, say every fifty years, with such shiftings of population and migrations as may be necessary to the carrying out of the new principle. In Europe, for instance, France would extend (as she soon afterwards did) into Alsace-Lorraine; Germany, along the Baltic and into Poland; Italy, into the "unredeemed" territories; Austria-Hungary, into Roumania and Roumania into Bessarabia, while Servia would get a port on the Aegean Sea.

In spite of the fact that the author warned the belligerents that the progressive movement of science was not to be arrested, and that all attempts to arrest it must unconditionally fail, the belligerents seem to have disregarded his advice, and anthropo-geography yet remains to be incorporated in the international code. The author admits that "there are certainly difficulties attached to the application of the new principle", and that the "national migrations" connected with its application furnish "one great difficulty". This admission is altogether justified. In spite of earthquakes, fires and floods, men will return even to the devastated region which they consider their home and incur the risk of perishing in a like calamity. Writers have learnedly discussed the conflict between science and religion. The present monograph suggests a conflict between science and sentiment, with the odds enormously in favor of the latter.

John Bassett Moore